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In the

Supreme Court of the United States

OCTOBER TERM, 1970

70-5058

No. ~~6350~~

DOROTHY LYNCH, ET AL.,
Appellants,

vs.

HOUSEHOLD FINANCE CORPORATION, ET AL.,
Appellees.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR APPELLEES

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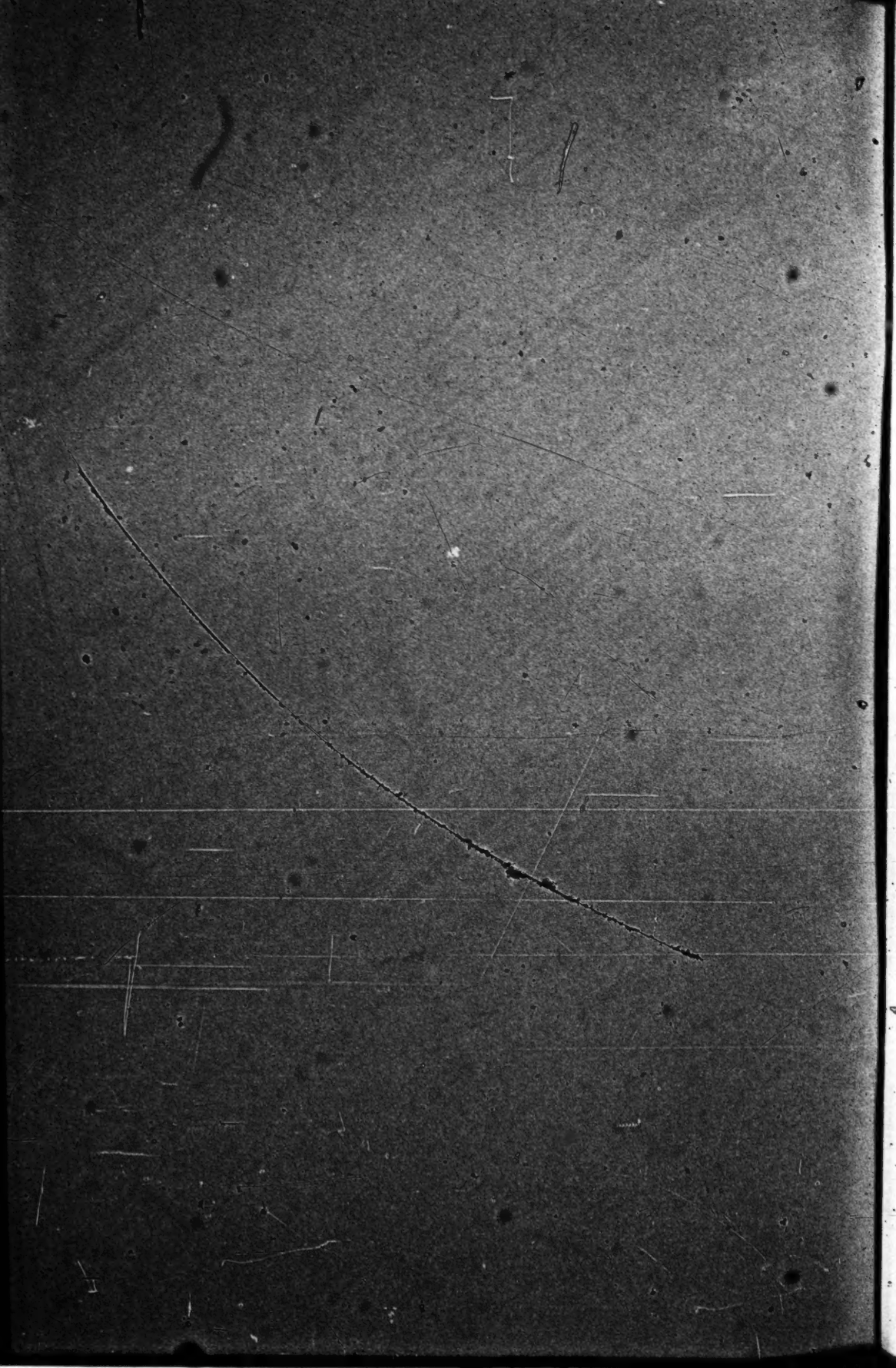

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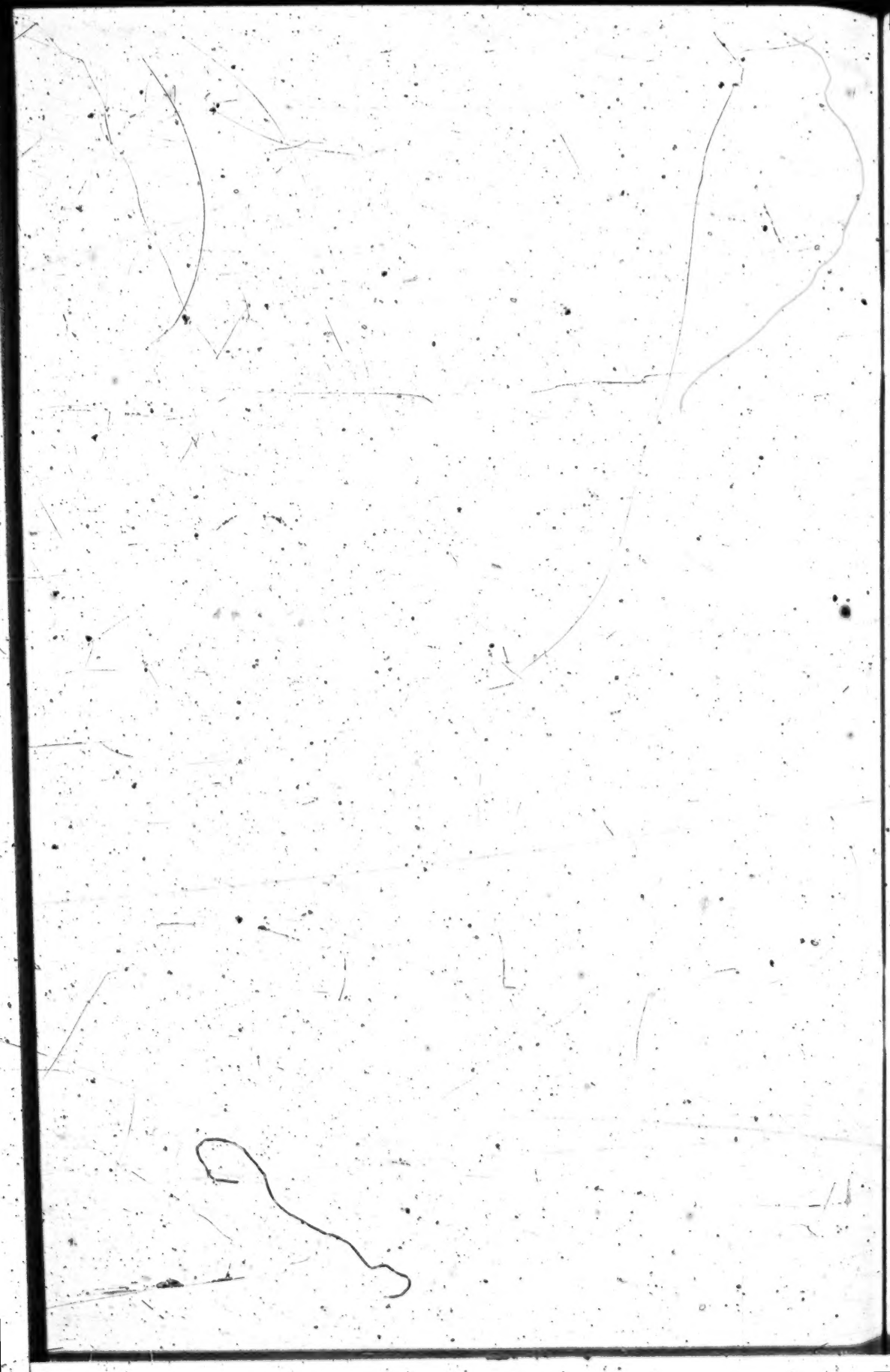

In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 6356

DOROTHY LYNCH, ET AL.,
Appellants,

vs.

HOUSEHOLD FINANCE CORPORATION, ET AL.,
Appellees.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR APPELLEES

JURISDICTION

Appellants' statement of jurisdiction (Brief for Appellants, p. 2) is a correct statement of the respective jurisdictional grounds sought to be invoked. Appellees, as set forth herein, do not agree that the court below had jurisdiction under 28 U.S.C. § 1343 (3) nor that this Court has jurisdiction under 28 U.S.C. § 1253.

STATUTES INVOLVED

In addition to those statutes noted in the Brief for Appellants, the following is applicable to this case:

Title 28, United States Code, § 1253 provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

STATEMENT OF THE CASE

On June 23, 1969, Household Finance Corporation, a Delaware corporation doing business in Connecticut (A. 7), through its attorney, David W. Goldman, commenced legal proceedings against Dorothy Lynch of New Haven, Connecticut, seeking damages of $525 on her past due note (A. 8, 22). The first step in these proceedings was service on that date by Deputy Sheriff Jack Friedler, an officer authorized to effect service, Conn. Gen. Stat. § 52-50, upon The Hospital of St. Raphael's Employees Credit Union, Inc., a credit union maintained by Mrs. Lynch's employer, The Hospital of St. Raphael in New Haven, Connecticut, (A. 8). Thereafter, Friedler effected service upon Mrs. Lynch on June 26, 1969 and returned the original writ to the Sixth Circuit Court in New Haven, Connecticut on July 1, 1969 (A. 8; Brief for Appellants, p. 6 n. 2). Service in this manner upon the Credit Union constituted a "garnishment" under Connecticut law, Conn. Gen. Stat. § 52-329. At the time of the garnishment, the Credit Union held a savings account of Mrs. Lynch in the amount of $494.83 (A. 8.) The effect of the garnishment of

the Credit Union was that from the date of service upon it, this amount was ". . . secured in the hands of such garnishee to pay such judgment as the plaintiff [Household Finance Corporation] may recover", Conn. Gen. Stat. § 52-329.

Subsequently, on March 4, 1970, during the pendency of the action in the Sixth Circuit Court, Dorothy Lynch, acting on behalf of herself and all other persons similarly situated (A. 5), brought this action in the United States District Court for the District of Connecticut against the Credit Union, Household Finance Corporation, Goldman, and Friedler, and, in Friedler's case, against him individually and as a representative of all the sheriffs, deputy sheriffs, and constables of the State of Connecticut. The Appellants sought the convening of a three-judge district court, 28 U.S.C. §§ 2281, 2284, to enjoin the defendants from applying and enforcing the Connecticut garnishment statute, Conn. Gen. Stat. § 52-329[1], and to declare the same to be unconstitutional as violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution (A. 5, 6). Jurisdiction was invoked pursuant to the Civil Rights Act, 28 U.S.C. § 1343 (3).

The essence of the complaint is that the Credit Union savings account constitutes an accumulation of savings from Mrs. Lynch's prior wages; she has need of such savings from time to time to defray her living expenses; the garnishment effected

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[1] The Complaint also attacked other Connecticut statutes, Conn. Gen. Stats. §§ 52-279, 52-280, 52-304, (A. 6). The Brief for Appellants (p. 4 n. 1) has recognized that the only process involved here is the garnishment process under Conn. Gen. Stat. § 52-329, and the claim with respect to the other statutes has been abandoned.

a deprivation of these savings to her hardship; the effecting of such a garnishment without prior notice or hearing is a deprivation of property without due process of law, and denies her and others of her class the equal protection of the laws by discriminating against debtors and the poor (A. 8, 9).

The court below, without hearing, dismissed the action on the appellees' motion for want of jurisdiction under 28 U.S.C. § 1343 (3) and, alternatively, because the action was barred by the anti-injunction statute, 28 U.S.C. § 2283. From that dismissal, the plaintiffs have appealed to this Court.

SUMMARY OF ARGUMENT

At the outset, this Court faces a question of its subject matter jurisdiction. The appellants purport to take this direct appeal pursuant to 28 U.S.C. § 1253 which permits such an appeal:

> ". . . from an order granting or denying, after *notice and hearing*, an interlocutory or permanent injunction in any civil action, suit or proceeding *required by any Act of Congress to be heard* and determined by a district court of three judges." (Emphasis added)

As emphasized throughout the Brief for Appellants (pp. 1, 6, 9, 12, 40, 42) there was no hearing below on the merits of the issue as contemplated by the statute; the complaint was dismissed on the alternative grounds of lack of jurisdiction under 28 U.S.C. § 1343(3) and the proscription of the anti-injunction statute, 28 U.S.C. § 2283 (A. 25, 26). Further, the ascertaining of a jurisdictional bar to acceptance of the action by the three-judge court is not itself a proceeding required to be heard by a three-judge court, *California Water Service Co.* vs. *Redding*, 304 U.S. 252, 254 (1938). Thus, the

clear holdings of such cases as *Mengelkoch* vs. *Industrial Welfare Com.*, 393 U.S. 83, 84 (1968), direct appellants to appeal to the United States Court of Appeals for the Second Circuit, and the instant appeal should be dismissed.

The substance of appellees' argument in chief rests on the alternative grounds of the dismissal below. First of all, the three-judge district court properly held that neither this case nor its companion, *Toro* vs. *Camposano*, were within its jurisdiction since they involved at most, a "loss of money" and not a "personal liberty" protected by the Civil Rights Act, 28 U.S.C. § 1343 (3), (A. 24). This distinction between primarily property-right interests and those personal liberties not dependent on a property interest for their existence finds clear articulation in Mr. Justice Stone's concurring opinion in *Hague* vs. *CIO*, 307 U.S. 496, 531 (1939), which both explained the rationale of the parallel development of 28 U.S.C. § 1343 (3) and 28 U.S.C. § 1331, previously implicit in such cases as *Holt* vs. *Indiana Mfg. Co.*, 176 U.S. 68 (1900), and foreshadowed its development through *Eisen* vs. *Eastman*, 421 F.2d 560 (2 Cir. 1969). The garnishment effected here of the savings account is essentially a matter of placing a lien on that account, *Coffin Bros. & Co.* vs. *Bennett*, 277 U.S. 29, 31 (1928), and as such, ". . . involves at most an incidental deprivation of personal rights in the sense of personal liberty, not dependent for its existence upon the infringement of property rights." (A. 24). Since Section 1343 (3) jurisdiction involves precisely such a personal liberty, *Goldberg* vs. *Kelly*, 397 U.S. 254 (1970), *King* vs. *Smith*, 392 U.S. 309 (1968), lacking here, *Coffin Bros. & Co.* vs. *Bennett, supra*, *McKay* vs. *McInnes*, 279 U.S. 820 (1929), the court below properly dismissed the action. *Eisen* vs. *Eastman, supra.*

In the alternative, the anti-injunction statute, 28 U.S.C. § 2283, bars this action. The historical thrust of the statute, although cast in terms of a proscription against an "injunction", applies with equal vigor to a declaratory judgment, *Great Lakes Dredge & Dock Co.* vs. *Huffman*, 319 U.S. 293, 299 (1943). The statute is addressed to "proceedings" in a state court, a term which, when examined in the light of its historical purposes, *Toucey* vs. *New York Life Insurance Co.*, 314 U.S. 118, 129 (1941), is a concept ranging far beyond the strict joinder of issues at bar to embrace all phases of a law suit including those ". . . supplemental or ancillary taken with a view to making the suit or judgment effective", *Hill* vs. *Martin*, 296 U.S. 393, 403 (1935). This is precisely the purpose of the Connecticut garnishment statute, *Coffin Bros. & Co.* vs. *Bennett, supra*, 277 U.S. at 31; *Sachs* vs. *Nussenbaum*, 92 Conn. 682, 689, 104 Atl. 393, 395 (1918); and intervention by the Federal District Court into the pending state procedure was, without assessing the propriety of discretionary abstention, *Younger* vs. *Harris*, 39 L.W. 4201, 4206 (1971), prohibited by 28 U.S.C. § 2283. *Atlantic Coast Line R. Co.* vs. *Engineers*, 398 U.S. 281, 287 (1970).

Nor is 42 U.S.C. § 1983 an exception to 28 U.S.C. § 2283. All of the remedies sought by the appellant can be pursued in the Connecticut courts, as was the case in Wisconsin in *Sniadach* vs. *Family Finance Corp.*, 395 U.S. 337 (1969). Furthermore, the very terms of the statute require an express authorization for what would otherwise be a significant historical departure, *Toucey* vs. *New York Life Ins. Co., supra*, and considering the strict construction to be given to Section 2283, *Amalgamated Clothing Workers of America* vs. *Richman Bros.*, 348 U.S. 511, 516, (1955), such authorization is lacking. *Atlanta Coast Line R. Co.* vs. *Engineers, supra.*

ARGUMENT

I. This Court Lacks Jurisdiction To Consider This Case On Direct Appeal

Appellants have appealed the district court's dismissals of their respective complaints directly to this Court pursuant to 28 U.S.C. § 1253. There is no question such a direct appeal would be proper if the three-judge district court had considered appellants' claims on the merits and then decided to deny the requested injunction. See *Boddie* vs. *Connecticut*, 39 L.W. 4294 (1971). But that is not what happened. Instead the district court ruled it lacked subject-matter jurisdiction even to consider the merits and, therefore, dismissed the complaints on that ground (A. 24). Under these circumstances, therefore, appellees now contend Section 1253 does not authorize a direct appeal.[2]

Underlying this contention is the basic principle that direct appeals to this Court are available only from decisions required to be determined by a panel of three judges. 28 U.S.C. § 1253. This Court has repeatedly held that, when a three-judge court dissolves itself and the action is dismissed for want of jurisdiction, no direct appeal is available under Section 1253. *Mengelkoch* vs. *Industrial Welfare Com.*, 393 U.S. 83, 84 (1968); *Wilson* vs. *City of Port Lavaca*, 391 U.S. 352 (1968). See *Idlewild Bon Voyage Liquor Corp.* vs. *Rohan*, 289 F.2d 426, 428-29 (2 Cir. 1961), *remanded sub nom.*

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[2] The question was not raised in appellees' motion to dismiss or affirm. However, see *Flast* vs. *Cohen*, 392 U.S. 83, 88 n. 2 (1968).

Idlewild Bon Voyage Liquor Corp. vs. *Epstein*, 370 U.S. 713 (1962). The instant case differs from the *Mengelkoch* and *Wilson* situations only in that here the three-judge court itself entered the order of dismissal rather than simply dissolving itself and permitting the single, convening judge to enter the final order.

But whether a single judge or three judges ordered dismissal does not matter. What counts is whether the order of dismissal *required* the participation of three judges. *Perez* vs. *Ledesma*, 39 L.W. 4214, 4215 (1971). Appellees contend it did not. In the first place, the cases have repeatedly held that, when a complaint, requesting convocation of a three-judge court, is first submitted to a single judge, that judge has the power and the responsibility to determine whether federal jurisdiction exists. *California Water Service Co.* vs. *Redding*, 304 U.S. 252, 254 (1938). See *Idlewild Bon Voyage Liquor Corp.* vs. *Epstein*, *supra*; *Ex Parte Poresky*, 290 U.S. 30 (1933); *German* vs. *South Carolina Ports Authority*, 295 F.2d 491 (4 Cir. 1961); *Shackman* vs. *Arnebergh*, 258 F. Supp. 983 (C.D. Cal. 1966), *appeal dismissed*, 387 U.S. 427 (1967). If jurisdiction is lacking, he may — without first convening a three-judge panel — order the action dismissed; and a proper appeal is directed to the United States Court of Appeals. *Jacobs* vs. *Tawes*, 250 F.2d 611, 614-15 (4 Cir. 1957). See *Johnson* vs. *Harder*, 438 F.2d 7 (2 Cir. 1971). If, on the other hand, the single judge improperly convenes a three-judge court, and it decides the request for injunction on the merits, the proper appeal, nevertheless, lies to the United States Court of Appeals. *Stainback* vs. *Mo Hock Ke Lok Po*, 336 U.S. 368, 381 (1949). See *Bailey* vs. *Patterson*, 369 U.S. 31

(1962). Consequently, where, as here, the three-judge panel exercised an authority available to the single, convening judge, the same method of appeal should apply. The decision not being one required to be determined by a three-judge court, no direct appeal to this Court is available. See *Oklahoma Gas & Elec. Co.* vs. *Oklahoma Packing Co.*, 292 U.S. 386 (1934); *Bell* vs. *Waterfront Com. of New York Harbor*, 279 F.2d 853 (2 Cir. 1960); Note, 49 Va. L. Rev. 538 (1963).

In addition, it is important to note that Section 1253 permits direct appeals to this Court only from orders granting or denying, after notice and hearing, an interlocutory or permanent injunction. In the instant case, of course, the district court never even considered whether to grant or deny an injunction (A. 24). Indeed, as the Brief for Appellants repeatedly emphasizes (pp. 1, 6, 9, 12, 40, 42), the district court rendered its decision without conducting any kind of hearing. Consequently, it is impossible to say that the district court's decision involved the extraordinary interference with a state statutory procedure which Congress reserved to the three-judge court and direct appeal procedure. *Kennedy* vs. *Mendoza-Martinez*, 372 U.S. 144, 154-55 (1963); Comment, 77 Harv. L. Rev. 299, 300 (1963). Rather, "here there was no order of any kind granting or denying an injunction — interlocutory or permanent." *Gunn* vs. *Committee To End War*, 399 U.S. 383, 387 (1970). Under these circumstances,

this Court should disregard its prior noting of probable jurisdiction, and dismiss this appeal summarily. *Id.* at 391.[3]

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[3] None of the four cases cited by appellants' Jurisdictional Statement and Brief in support of this Court's jurisdiction are applicable, given the posture of the instant appeal. In *American Federation of Labor* vs. *Watson*, 327 U.S. 582 (1946), a temporary injunction had issued and the three-judge court had assumed subject-matter jurisdiction. 327 U.S. at 588-89. Similarly, in *Damico* vs. *California*, 389 U.S. 416 (1967), the three-judge court had also taken subject-matter jurisdiction, but denied the injunction for failure to exhaust state administrative remedies. 389 U.S. at 416-17. The three-judge court also denied the injunction on the merits in *Harper* vs. *Virginia State Bd. of Elections*, 383 U.S. 663, 664 (1966). In *Baker* vs. *Carr*, 369 U.S. 186 (1962), *reversing*, 179 F. Supp. 824 (M.D. Tenn. 1959), the district court had granted motions to dismiss under Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, because it regarded the constitutionality of misapportionment to be a political and, therefore, non-justiciable question. See *Baker* vs. *Carr*, *supra*, 179 F. Supp. at 826. In this last case, of course, this Court did take the case on direct appeal from a three-judge court dismissal for want of jurisdiction. However, in *Baker* vs. *Carr* — in contrast to the instant appeal — the basis for the district court's jurisdictional ruling and the basis for its ruling denying the requested relief were identical. The jurisdictional obstacle in the instant cases, by contrast, is different from and preliminary to any consideration of the constitutionality of Connecticut's garnishment statute.

II. Appellants' Complaints Are Not Justicable Under 28 U.S.C. § 1343(3).

A. Section 1343(3) Does Not Comprehend Deprivations Of Mere Property Rights.

In *Eisen* vs. *Eastman*, 421 F.2d 560 (2 Cir. 1969), the United States Court of Appeals for the Second Circuit held that a complaint alleging only a loss of money did not establish federal jurisdiction under 28 U.S.C. § 1343(3). *Id.* at 566. In the instant actions, the district court followed the same rationale, holding that the alleged garnishments of appellants' respective checking and credit union accounts constituted, at best, only an alleged taking of money; and, therefore, it lacked subject-matter jurisdiction (A. 24-25).

The basis of both these decisions is Mr. Justice Stone's concurring opinion in *Hague* vs. *C.I.O.*, 307 U.S. 496 (1939), in which he considered the relationship of two federal jurisdictional statutes, Section 24(1) and Section 24(14) of the Judicial Code of 1911. Section 24(1), now enacted as 28 U.S.C. § 1331, creates federal jurisdiction over all questions arising under the Constitution, laws and treaties of the United States, so long as a certain minimum dollar amount is in controversy. Section 24(14), now 28 U.S.C. § 1343(3), creates federal jurisdiction to redress deprivations, under color of state law, of any right, privilege or immunity secured by the Federal Constitution or laws providing for equal protection.

In his *Hague* opinion Mr. Justice Stone noted that many civil rights, including those of free speech and assembly — which he regarded as central to the controversy then before the Court — were not susceptible to pecuniary valuation. 307 U.S. at 529. In such cases, he ruled, Section 24(1) was in-

applicable; otherwise it would make Section 24(14) a nullity. *Id.* at 530. Comment, 39 Mich. L. Rev. 284, 285 (1940). On the other hand, he carefully limited his holding to situations in which the asserted federal right was not dependent for its existence upon an infringement of property. *Id.* at 531. The necessary implication is that, when the asserted federal right can be valued in terms of money, due observance must be paid to the requirement of Section 24(1) that federal courts not take jurisdiction of even constitutional questions unless a certain minimum dollar amount is involved. See Note, 1970 Duke L. J. 819, 821-23 (1970).[4]

However, appellants attempt to avoid the logic of Mr. Justice Stone's analysis by asserting that the legislative intent behind the 1871 Civil Rights Act was to redress deprivations of property under color of state law. Brief for Appellants, pp. 28-32. Some commentators provide some support for this assertion, see Note, *supra*, 1970 Duke L. J. at 835-36. But traditionally, the Fourteenth Amendment and associated Civil Rights Acts were primarily regarded as protectors of civil, not property rights. Comment, *supra*, 39 Mich. L. Rev. at 287 n. 6. See *Strauder* vs. *West Virginia*, 100 U.S. 303 at 306-07 (1880); *Ex Parte Virginia*, 100 U.S. 339 at 344-45 (1880). The fact

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[4] Courts and commentators have not been overly precise in their articulation of Mr. Justice Stone's formulation. Note, *supra*, 1970 Duke L. J. at 825. But whether the test focuses on susceptibility to pecuniary valuation or on dependence upon infringement of a property right, the interest involved in *Eisen* and those involved in the instant actions would all fall within the category required to comply with the jurisdictional amount requirement of 28 U.S.C. § 1331.

of the matter is that the Reconstruction enactments were loosely drawn, *United States* vs. *Williams*, 341 U.S. 70, 74 (1951); and were subjected to extremely restrictive interpretation during most of their duration. Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich. L. Rev. 1323, 1336-37 (1952).[5] Indeed, not until 1961, when this Court decided *Monroe* vs. *Pape*, 365 U.S. 167, did commentators express concern that this Court had made the district courts forums "for litigating every invasion of personal and property interest alleged to be a denial of due process." Comment, 49 Calif. L. Rev. 145, 160 (1961). Consequently, appellants' assertion, that "the legislative and judicial history of Sections 1983 and 1343(3) conclusively demonstrate" those statutes apply to deprivations of property, is unfounded. Brief for Appel-

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[5] According to this author, the central concern of the Congress in enacting the 1871 Civil Rights Act — of which 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983 were originally a part — had nothing to do with deprivations of property. Rather Congress was concerned with the lawless conduct of the Ku Klux Klan and other southern elements; it regarded what is now 42 U.S.C. § 1985(3) as being the core of its enforcement efforts. *Gressman, supra*, 50 Mich. L. Rev. at 1334.

It is also interesting to note that, although Sections 1343(3) and 1983, in their original form as parts of Section 1, Act of April 20, 1871, ch. 22, 17 Stat. 13, were patterned after what is now 18 U.S.C. § 242, *Monroe* vs. *Pape, supra*, 365 U.S. at 226 (Frankfurter, J. dissenting), that latter, criminal statute has never been understood by this Court to apply to deprivations of property. See Annotation, 20 L. Ed.2d. 1454 (1969).

lants, p. 28. On the contrary, it appears the Reconstruction Congress felt it had adequately insured the property rights of newly-freed Negro citizens by enacting in 1866 what is now 42 U.S.C. § 1982.[6]

Moreover, at the time Mr. Justice Stone wrote his *Hague* opinion, it was most definitely unclear that the due process clause encompassed deprivations of property. Note, 52 Harv. L. Rev. 1136, 1137-40 (1939). Indeed, the earlier decisions of this Court suggested it did not. *Carter* vs. *Greenhow*, 114 U.S. 317 (1885); *Pleasants* vs. *Greenhow*, 114 U.S. 323 (1885); *Holt* vs. *Indiana Mfg. Co.*, 176 U.S. 68 (1900). See Comment, *supra*, 49 Calif. L. Rev. at 158. As Judge Friendly remarked in *Eisen* vs. *Eastman*, *Carter*, *Pleasants* and *Holt* are still good law; reading Sections 1983 and 1343(3) to apply to mere takings of money would clearly involve overruling these decisions. 421 F.2d at 566.

On the other hand, nothing in these decisions, or in Mr. Justice Stone's *Hague* opinion, suggests that the Fourteenth Amendment itself is inapplicable to deprivations of property. At issue in all these cases is simply the question whether an act of Congress gave the federal courts original jurisdiction to consider the alleged deprivation. Mr. Justice Stone read Section 24(14) of the Judicial Code so that federal courts could

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[6] Section 1982 was originally enacted as part of Section 2, Act April 9, 1866, ch. 31, 14 Stat. 27. In essence, it limits itself to prohibiting any discrimination between the rights of white citizens and other citizens to enjoy and dispose of real or personal property. *Jones* vs. *Mayer Co.*, 392 U.S. 409, 422-437 (1968).

consider deprivations of constitutional rights which could not be valued. This was at a time when Section 24(14) was regarded as being moribund, Note, 66 Harv. L. Rev. 1285, 1286 (1953) and when litigants sometimes asserted such intangible rights did have monetary values in order to assure Section 24(1) jurisdiction. Note, *supra*, 52 Harv. L. Rev. at 1136 n. 3. But Mr. Justice Stone also paid due recognition to the Congressional enactment of Sec. 24(1) in 1875 and to the inclusion of both that section and the civil rights jurisdictional section in the Judicial Code. *Hague* vs. *C.I.O.*, *supra*, 307 U.S. at 328-330. It was for this reason he distinguished between constitutional deprivations to which no monetary value could be attached and those whose value could be accurately calculated because of the underlying property interests involved.

Given the gradually expanding scope of the due process and equal protection concepts, the filtering mechanism provided by the *Hague* formulation serves a noteworthy and desirable function. Note, *supra*, 66 Harv. L. Rev. at 1287. As Judge Friendly pointed out in *Eisen*:

> "It has the merit of preserving not only the kind of case that was at the core of congressional concern in 1871 but a good many others that Congress would desire to have within the statute, while at the same time excluding cases that neither the Reconstruction Congress nor later Congresses could really have had in mind."

421 F.2d at 565-66. See *National Land & Investment Co.* vs. *Specter*, 428 F.2d 91, 98-100 (3 Cir. 1970).[7]

Furthermore, the fundamental validity of Stone's formulation has been confirmed by its repeated invocation by lower federal courts. See, e.g., *Weddle* vs. *Director*, 436 F.2d 342 (4 Cir. 1970); *National Land & Investment Co.* vs. *Specter, supra; Bussie* vs. *Long*, 383 F.2d 766 (5 Cir. 1967); *McManigal* vs. *Simon*, 382 F.2d 408 (7 Cir. 1967), *cert. denied*, 390 U.S. 980 (1968); *Howard* vs. *Higgins*, 379 F.2d 227 (10 Cir. 1967); *Gray* vs. *Morgan*, 371 F.2d 172 (7 Cir. 1966) *cert. de-*

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[7] Appellants' proposed interpretation of the relationship of Sections 1331 and 1343(3) clearly works violence to the *Hague* formulation. This interpretation dispenses with any inquiry whether a claimed deprivation involved an infringement of property and makes an allegation of state action the sole determinant of Section 1343(3) jurisdiction. Brief for Appellants, pp. 33-35. This interpretation would eliminate the requirement of a jurisdictional amount in controversy in a significant number of cases. See *Eisen* vs. *Eastman, supra*, 421 F.2d at 561 n. 1. Such a change may or may not constitute a desirable improvement, see generally American Law Institute, *Study Of The Division Of Jurisdiction Between State and Federal Courts* (1969); but clearly it would constitute "a major change in what has been understood to be accepted doctrine." *Johnson* vs. *Harder, supra*, 438 F.2d at 12 n. 6. Should this Court choose to adopt appellants' suggestion in construing these jurisdictional sections, it would surely raise some question concerning the Congress's traditional authority to define the jurisdiction of the inferior federal courts.

nied, 386 U.S. 1033 (1967); *Ream* vs. *Handley*, 359 F.2d 728 (7 Cir. 1966). This Court has itself, *per curiam*, affirmed three-judge court dismissals of civil rights actions involving only property right infringements. *Hornbeck* vs. *Hamm*, 393 U.S. 9 (1968), *affirming* 283 F. Supp. 549 (M.D. Ala. 1968); *Abernathy* vs. *Carpenter*, 373 U.S. 241 (1963), *affirming* 208 F. Supp. 793 (W.D. Mo. 1962). Furthermore, this Court recognized the less than all-inclusive nature of Section 1343(3) in its recent decision of *Wisconsin* vs. *Constantineau*, 39 L.W. 4128 (1971):

> "Congress could of course have routed all federal constitutional questions through the state court systems, saving to this Court the final say when it came to review of the state court judgments. But our First Congress resolved differently and created the federal court system and in time granted the federal courts various heads of jurisdiction, *which today involve most Federal constitutional rights.*"

39 L.W. at 4129 (emphasis added.) In other words, the legislative history of Section 1343(3) and the prior decisions construing that section permit only one conclusion: The statute is inapplicable to situations where, as here, the crux of the civil rights claim is interference, under color of state law, with appellants' interests in property.

B. The Only Deprivation Suffered By Appellants Was Interference With Their Property.

The district court's opinion states that the constitutional deprivation alleged in the instant cases — garnishment of appellants' bank accounts — "has to do almost entirely with the loss of money" (A. 24). In fact, appellants did not really lose

their deposited funds. Garnishment constitutes at best only a temporary interference with access to such funds (A. 25). Interference with deposited funds is only a property infringement; even if effected in a manner allegedly violative of the Constitution, it is not comprehended by the 1871 Civil Rights Act. *Bradford Audio Corp.* vs. *Pious*, 392 F.2d 67, 72 (2 Cir. 1968).

Appellants cite a number of cases and argue that certain lower court decisions based on Section 1343(3)'s property interest exclusion are inconsistent and unpredictable. Brief for Appellants, pp. 22-27. They forget that this Court and other courts have always sought to avoid unduly harsh results in cases involving property-type interests by recognizing the intimate degree to which such interests may be related to invaluable personal rights. See *Eisen* vs. *Eastman, supra*, 421 F.2d at 564-65. As Judge Friendly stated, Mr. Justice Stone's formulation — which asserted the applicability of the civil rights jurisdictional statute to situations not amenable to pecuniary valuation — should be "generously construed." *Id.* at 566.

But there is a limit to which any court can stretch the Stone formulation. Appellees contend that none of the decisions cited by appellants are applicable to the alleged facts of the instant actions. In the first place, in many of these cases — in which federal courts seem to have taken jurisdiction to consider alleged constitutional deprivations in connection with property-type interests — federal jurisdictions existed on in-

dependent grounds.[8] In the remaining cases, Section 1343(3) jurisdiction was based on the intimate relationship between the property-type interest involved and the enjoyment of invaluable personal liberties. See, e.g., *Rosado* vs. *Wyman*, 397 U.S. 397 (1970); *Goldberg* vs. *Kelly*, 397 U.S. 254 (1970); *Thorpe* vs. *Housing Authority*, 393 U.S. 268 (1969). Some lower courts have even decided this critical relationship existed in the case of certain special kinds of personal property. Compare *Santiago* vs. *McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970), with *McCormick* vs. *First National Bank*, 322 F. Supp. 604 (S.D. Fla. 1971).

More important, however, for purposes of the instant appeal, are the important differences between the kinds of property-type interests involved in cases in which the courts have taken Section 1343(3) jurisdiction and in the instant actions. In each of the former cases the courts have taken pains to emphasize that, because of the nature of the property-type interest involved, its deprivation immediately and necessarily affected

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[8] Jurisdiction existed under 28 U.S.C. § 1331 in *Swarb* vs. *Lennox*, 314 F. Supp. 1091, 1096 (E.D. Pa. 1970), *prob. juris. noted*, 39 L.W. 3424 (1971); and in *Klim* vs. *Jones*, 315 F. Supp. 109, 115 (N.D. Cal. 1970). The courts properly took jurisdiction under 28 U.S.C. § 1343(3) on the basis of claims of unreasonable search and seizure in *Hall* vs. *Garson*, 430 F.2d 430, 438 (5 Cir. 1970); *Fuentes* vs. *Faircloth*, 317 F. Supp. 954, 956 (S.D. Fla. 1970), *prob. juris. noted*, 39 L.W. 3359 (1971); and *Laprease* vs. *Raymours Furniture Co.*, 315 F. Supp. 716, 721 (N.D. N.Y. 1970) Indeed, in *Hall* vs. *Garson*, the court specifically disclaimed any intention to consider the property interest exception to Section 1343(3), 430 F.2d at 439 n. 19. See also *Dale* vs. *Hahn*, No. 35059, — F.2d — (2 Cir. 1971).

the personal liberties of the persons involved. *Goldberg* vs. *Kelly, supra,* 397 U.S. at 264-65; *Johnson* vs. *Harder, supra,* 438 F.2d at 12; *Santiago* vs. *McElroy, supra,* 319 F. Supp. at 291; *Klim* vs. *Jones, supra.* See *Eisen* vs. *Eastman, supra,* 421 F.2d at 564-65; *Laprease* vs. *Raymours Furniture Co., supra,* 315 F. Supp. at 722-23.[9]

The instant cases, by contrast, involve only infringements of the use of money. Indeed, appellants do not even argue that, considered by themselves, checking or credit union accounts are so closely related to the exercise of personal liberties that their deprivation should be, for that reason alone, justiciable under Section 1343(3). Rather appellants invite the courts to elevate to the status of invaluable personal liberties

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[9] Appellants reliance upon *Escalera* vs. *New York City Housing Authority,* 425 F.2d 853 (2 Cir. 1970), *cert. denied,* 39 L.W. 3149, is misplaced. Although the appeals court's opinion does suggest Section 1343(3) jurisdiction exists when a deprivation of procedural due process incidentally affects a property interest, 425 F.2d at 864, this form of analysis has been sharply criticized. *Collins* vs. *Bolton,* 287 F. Supp. 393, 401 (N.D. Ill. 1968). Moreover, the author of the *Escalera* decision earlier wrote the court's opinion in *McCall* vs. *Shapiro,* 416 F.2d 246 (2 Cir. 1969), and sat on the panel deciding *Tichon* vs. *Harder,* 438 F.2d 1396 (2 Cir. 1971) ("For purposes of § 1343(3) jurisdiction the claim that appellant was denied procedural due process has no independent jurisdictional significance. . . ." 438 F.2d at 1399). Finally, unlike the instant cases, it clearly appears in *Escalera* that the court viewed the property-type interests affected by the alleged denial of procedural due process — including increases in rent — as being the equivalent of welfare benefits to which Section 1343(3) clearly applies. 425 F.2d at 864.

their interests in these private bank accounts simply on the basis of their allegations of poverty. Appellants claim that solely because they are impoverished, their private bank accounts are as necessary to their subsistence as are welfare payments or public housing benefits to their recipients. Therefore, they suggest, their deposited funds should enjoy the same special Section 1343(3) status as do interests in public housing or welfare rights.

The district court detected the fallacies in this argument and noted some of its flaws (A. 25). In the first place, not even all welfare benefits enjoy "personal liberty" status. *McClellan* vs. *Shapiro*, 315 F. Supp. 484, 487 (D. Conn. 1970). See *Dandridge* vs. *Williams*, 397 U.S. 471 (1970); *McCall* vs. *Shapiro, supra; Rothstein* vs. *Wyman*, 303 F. Supp. 339 (S.D. N.Y. 1969), *vacated*, 398 U.S. 275 (1970). But, more important, there are generic differences between the critical welfare benefits to which the courts have given "personal liberty" status and appellants' personal bank accounts. Welfare benefits enjoy their special status not simply because of the "brutal need" of their recipients for subsistence, *Kelly* vs. *Wyman*, 294 F. Supp. 893, 900 (S. D. N.Y. 1968), *aff'd. sub. nom. Goldberg* vs. *Kelly, supra;* but because they are dispensed as the result of a legislative determination that, without such assistance, welfare recipients cannot exercise their fundamental constitutional rights. *Goldberg* vs. *Kelly, supra*, 397 U.S. at 264-65; *Rothstein* vs. *Wyman, supra*, 303 F. Supp. 346-47. Obviously, no such legislative determination distinguishes appellants' privately accumulated funds.

More critical still, however, is the fundamental difference between the manner in which the courts have traditionally approached property-type interests deserving of Section 1343(3)

status and the approach appellants now propose. In the past, the courts have always determined whether a property-type interest was sufficiently related to the exercise of an invaluable personal liberty simply by scrutinizing the nature or character of the interest involved. See, e.g., *Goldberg* vs. *Kelly, supra* (welfare payments); *Thorpe* vs. *Housing Authority, supra* (occupancy of scarce public housing); *Klim* vs. *Jones, supra* (personal property without which plaintiff could not work). But appellants want the courts to abandon this traditional test. Instead they want this Court to elevate to the status of "personal liberties" their interests in their bank accounts — or, *a fortiori*, their interests in any kind of property — simply because of their impoverished status; they want to make the test depend not on the character of the property-type interest involved, but upon the existence of allegations of sufficiently desperate subjective need. Such an approach, of course, would not eliminate the Section 1343(3) property interest exclusion; rather it would make that exclusion inapplicable to any plaintiff who alleged in his complaint that "he really needed the money" or whatever else the particular property involved might be.

This Court cannot countenance such a suggestion. Making a litigant's allegations of subjective need the key determinent of whether civil rights subject-matter jurisdiction exists would expose the district courts to a wave of claims never before comprehended by Section 1343(3). It would make the simple allegation that a prisoner really needed his money or that a probationary social worker really needed her employment sufficient to establish jurisdiction. See *Howard* vs. *Higgins, supra; Tichon* vs. *Harder, supra*. Furthermore, many such actions would inevitably require evidentiary hearings preliminary to

taking jurisdiction as civil rights defendants sought to establish that the requisite subjective need or alleged economic hardship did not, in fact, exist. This Court should be extremely reluctant to impose such additional demands upon district courts which are already overburdened by the claims of civil rights litigants. *Eisen* vs. *Eastman, supra,* 421 F.2d at 561 n. 1.

III. The Relief Sought By Appellants Is Barred By 28 U.S.C. § 2283.

Appellants attack the alternative conclusion of the court below that 28 U.S.C. § 2283 precluded the relief sought on essentially three grounds. First, they contend that the garnishment process is not a "proceeding" under such Section 2283; second, that in any event, the request for a declaratory judgment and future relief lie beyond the "injunction" proscription of the statute; and finally, that an action under 42 U.S.C. § 1983 is warranted because of the inadequacy of remedies in the Connecticut courts. In addition, it has been suggested in such cases as *Cooper* vs. *Hutchinson,* 184 F.2d 119 (3 Cir. 1950), that Section 1983 is an "expressly authorized" exception to Section 2283, a point recognized but reserved by this Court in *Dombrowski* vs. *Pfister,* 380 U.S. 479, 485 n. 2 (1965).

Before proceeding further, it is important to place Section 2283 in its historical context. The statute dates from Section 5 of the Act of March 2, 1793, ch. 22, 1 Stat. 335. Its purpose, unchanged by Congress throughout its long history, is to assure that proceedings underway in state courts should be free from federal intrusion, *Toucey* vs. *New York Life Insurance Co.,* 314 U.S. 118, 135 (1941), in order to prevent need-

less friction between the state and federal systems, *Oklahoma Packing Co.* vs. *Oklahoma Gas & Elec Co.*, 309 U.S. 4, 9, (1939), and thus permit the state courts to pursue their responsibility, equally with the federal courts, "to guard, enforce and protect every right granted or secured by the Constitution of the United States . . ." *Zwickler* vs. *Koota*, 389 U.S. 241, 248 (1967); *Robb* vs. *Connolly*, 111 U.S. 624, 637 (1884). It is the statutory dimension of the broad doctrine of comity, see Note 83 Harv. L. Rev. 1870, 1872, (1970), predicated upon a "scrupulous regard for the rightful independence of state government", *Matthews* vs. *Rogers*, 284 U.S. 521, 525 (1932), *Harrison* vs. *N.A.A.C.P.*, 360 U.S. 167, 176 (1959), in furtherance of the "harmonious relation between state and federal authority" that is at the heart of our federal system, *Railroad Commission of Texas* vs. *Pullman Co.*, 312 U.S. 496, 501, (1941). The reach of the comity principle extends beyond intrusion into pending state proceedings to embrace the considerations of judicial abstension in the absence of such proceedings, *Harrison* vs. *N.A.A.C.P.*, *supra*; *Zwickler* vs. *Koota*, *supra*. However, Section 2283, a matter of first business for the Congress of the United States, codifies the broader principle in the specific context of pending state proceedings by teaching that they ". . . should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, to the state appellate courts and ultimately to this Court." *Atlantic Coast Line R. Co.* vs. *Engineers*, *supra*, 398 U.S. at 287.

A. The Connecticut Garnishment Process Is A "Proceeding" Within The Meaning Of 28 U.S.C. § 2283.

The Connecticut garnishment process, like Section 2283 itself, is of historical tradition. It finds its first codification in "An Act for the Recovery of Debts", Acts and Laws of Connecticut, p. 137 (1796), and its language, now incorporated in Conn. Gen. Stat. § 52-329, has remained virtually unchanged since that time. The origins of the process can be traced further to a pre-colonial commercial custom of London, *Ownby* vs. *Morgan*, 256 U.S. 94, 104 (1921), and beyond, see dissenting opinion of Black, J. in *Sniadach* vs. *Family Finance Corp., supra*, 395 U.S. at 349. It is a kind of attachment; literally, a process of "foreign attachment", extending to certain assets of a defendant in the hands of a third party. The purpose is to seek security for any judgment subsequently rendered against such a defendant and the effect of the garnishment process is to put a conditional lien on the assets of the defendant in the hands of a third party during the pendency of the suit. *McInnes* vs. *McKay*, 127 Me. 110, 141 Atl. 699, 702 (1928) *aff'd. per curiam* 279 U.S. 820 (1929). It is a process carefully prescribed by an extensive body of statutes of long standing. For instance, it does not apply at all to wages, Conn. Gen. Stat. § 52-361; is restricted in the case of bank checking accounts, Conn. Gen. Stat. § 52-337a; and exempts those necessities of life which are themselves made exempt from execution under Conn. Gen. Stat. § 52-

352.[10] It is true, as the appellants point out, that the process is initiated by a lawyer in his capacity as a Commissioner of the Superior Court, Conn. Gen Stats. §§ 51-85, 52-89, a "liberal policy" and "extraordinary power" long noted and taken into account by the Connecticut courts and their many interpretations of the statutes. *Finch* vs. *Great American Co.*, 101 Conn. 332, 335, 125 Atl. 628, 629 (1924). It is available at the outset of suit, Conn. Gen. Stat. § 52-329, or after suit has commenced, Conn. Gen. Stat. § 52-281, although in the latter case it is subject to a court order. Service of the garnishment process may be effected by a sheriff, a deputy sheriff, a constable of the town in question, an other "proper officer", or by an "indifferent person", Conn. Gen. Stat. § 52-50.

Following service, a defendant may proceed under Conn. Gen. Stat. § 52-301 to compel a plaintiff to verify a claim under oath and submit particulars, or may seek a discharge of a garnishment believed to be excessive under Conn. Gen. Stat. § 52-302, a separate proceeding which results in a final judgment for the purposes of appeal, *Sachs* vs. *Nussenbaum*, 92 Conn. 682, 686, 104 Atl. 393, 394 (1918), or dissolve the garnishment upon substitution of a bond with a surety, as established by the court under Conn. Gen. Stat. § 52-304. A surety need not be, as assumed by the appellants (Brief for

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[10] It is probably also restricted as to certain kinds of tort actions and with respect to certain classes of defendants as set forth in Conn. Gen. Stat. § 52-279. Appellants assert that these restrictions are applicable only to attachments (See Brief for Appellants, p. 17 n. 8), but the better view would extend them to garnishments as well. See *Jepson* vs. *Toni Co.*, 20 Conn. Supp. 287, 291, 133 A.2d 150, 152 (1957).

Appellants, p. 46a) a professional surety, *King* vs. *Malone*, 91 Conn. 342, 99 Atl. 691 (1917); *Mallory* vs. *Hartman*, 86 Conn. 615, 86 Atl. 567 (1913). Of course, voluntary arrangements between the parties for dissolution will be binding. *Fazzano* vs. *Martin*, 94 Conn. 91, 93, 108 Atl. 512, 513 (1919). It is a process akin to that which has been considered by this Court on several occasions, e.g., *Ownby* vs. *Morgan*, *supra*, *Harris* vs. *Balk*, 198 U.S. 215 (1905), and which has been sustained against a Constitutional attack identical with that brought by the appellants. *McKay* vs. *McInnes*, *supra*. See *Coffin Bros. & Co.* vs. *Bennett*, *supra*.

The Connecticut garnishment process, then, is no whimsical aberration; it is addressed in over fifty sections of the Connecticut General Statutes and existed in statutory form at least as long as the predecessors of 28 U.S.C. § 2283. As a matter of custom and practice, it has existed even longer.[11] Given the historical purpose of Section 2283, and the coexistent standing of the garnishment process as practiced throughout the history of the State of Connecticut, this Court should be loath to intervene in view of the action pending in the Connecticut court except upon a clear and express statutory direction. Section 2283 is phrased in terms of profound substance, and not of form; it is concerned with the very essence of our

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[11] Professor Stephenson, in his 1966 Supplement to Connecticut Civil Procedure (1959) prefaces his section on "Garnishment" with a paragraph entitled "A Warning to the Garnishee" which advises that "contrary to the statement in the original text, there is case law authority for both attachment and garnishment predating statutes authorizing these procedures . . ." Stephenson, *supra*, p. 32

federal system and its admonition is against interference with the processes of a state's judicial system, once set in motion. No more concrete example of such process — or "proceedings" — rooted in the legal ancestry of a state can be summoned to mind than the process of garnishment which is involved in the instant actions. See *Jackman* vs. *Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

Further, this Court has made it perfectly clear that the concept of "proceedings" in Section 2283 is, consistent with its historical purpose, a broad one:

> ". . . it includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process . . . It applies alike to actions by the Court and by its ministerial officers, applies not only to executions issued on a judgment but to any proceedings supplemental or ancillary taken with the view to making the suit or judgement effective."
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> *Hill* vs. *Martin*, 296 U.S. 393, 403 (1935).

The concept of "proceedings" has been held to apply to such diverse steps and actions as the efforts of a receiver, *Drexler* vs. *Walters*, 290 F. Supp. 150, 155 (E.D. Minn. 1968); a sheriff's sale on execution, *American Association* vs. *Hurst*, 59 Fed. 1 (C.C.A.6. 1893); a trustee's accounting to his beneficiaries, *Hershey* vs. *First National Bank and Trust Co.*, 22 F. Supp. 517 (M.D. Pa. 1938); and, of increasing recent importance, arrests and issuances of warrants, *Brooks* vs. *Briley*, 274 F. Supp. 538, 553 (M.D. Tenn. 1967), *aff'd. per curiam*, 391 U.S. 361 (1968). It has been specifically held to apply to pre-judgment lien measures taken in furtherance of pending litigation. *Javelin Oil Co.* vs. *Morrow Drilling Co.*, 266 F. Supp. 119, 122 (W.D. La. 1967). See *National Labor Relations Board* vs. *Underwood Machine Co.*, 198 F.2d 93, 94 (1 Cir. 1952). In the

instant case, the garnishment effected by deputy sheriff Friedler, acting as agent for attorney Goldman and Household Finance Corporation, was clearly a step taken at the institution of suit with a view to making the judgment effective, and this step is a "proceeding" under Section 2283, *Hill* vs. *Martin*, *supra*, 296 U.S. at 403.

B. Declaratory And Injunctive Relief Were Properly Denied.

The appellants claim that, notwithstanding the applicability of Section 2283 to the request for a present injunction, the court below was bound to consider, and grant, the request for a declaratory judgment and an injunction against future proceedings. At the outset, it should again be noted that with respect to the declaratory judgment aspect, no direct appeal lies to this Court under 28 U.S.C. § 1253 from the lower court's action. *Perez* vs. *Ledesma*, 39 L.W. 4214, 4216 (1971).

It is true that Section 2283 speaks historically only of an "injunction" and not of a "declaratory judgment". The declaratory judgment procedure is relatively new in comparison to Section 2283. See Act of June 14, 1934, ch. 512, 48 Stat. 955 (28 U.S.C. §§ 2201-02). Subsequently, in 1948, Congress did revise Section 2283 without including specific reference to declaratory judgments, Act of June 25, 1948, ch. 646, 62 Stat. 968. By comparison, the Act of August 24, 1935, ch. 641, § 30, 49 Stat. 770 (7 U.S.C. § 623(a)), amending the Agricultural Adjustment Act, Act of May 12, 1933, ch. 25, tit. I, 48 Stat. 31, illustrates that Congress can explicitly ban declaratory judgments when it has the matter clearly in mind. However, the revision of Section 2283 in 1948 occurred in the context of

a general code revision and no special concern for the relation of Section 2283 and declaratory judgments is apparent. Further, it is one thing to examine the close, technical language relating to the processing tax on, for instance, rice, in the Agricultural Adjustment Act, and another to examine the purpose of a statute such as Section 2283 which has expressed a broad and vital national policy throughout our history.

Although this Court appears to have reserved decision on the precise point, *Younger* vs. *Harris*, 39 L.W. 4201, 4206 (1971), the court below elected to meet the issue head-on as an alternative basis for its decision, and decided the issue correctly in the context of this case. The view of the lower court is consistent with the broad purposes of Section 2283, which is concerned with the procedural relationship of the federal judicial system to that of a state whose judicial machinery has been previously set in motion. As a practical matter, a declaratory judgment is recognized as resulting in the same kind of intervention in state proceedings that the long standing policy limiting injunctions was designed to avoid. *Samuels* vs. *Mackell*, 39 L.W. 4211, 4213 (1971); *Perez* vs. *Ledesma*, *supra*, 39 L.W. at p. 4220, (opinion of Brennan, J.). See Note, *supra*, 83 Harv. L. Rev. at 1880. It is true that *Samuels* and *Perez* are esentially "abstention" cases and do not need to go to the direct question of a declaratory judgment prohibition under Section 2283; in this regard, they draw force from the earlier consideration of the effect of declaratory judgments in *Great Lakes Dredge & Dock Co.* vs. *Huffman*, 319 U.S. 293, 299 (1943). However, given that in the instant cases state proceedings are already pending, the considerations affecting a decision to intervene with a declaratory judgment are even more sensitive in view of the long-standing policy of

Section 2283. The majority of cases directly considering the point have specifically held that a declaratory judgment is embraced within the proscription of Section 2283, e.g. *McLucas* vs. *Palmer*, 427 F.2d 239, 241 (2 Cir. 1970); *City of Houston* vs. *Standard-Triumph Motor Co.*, 347 F.2d 194, 197-199 (5 Cir. 1965), *cert. denied*, 382 U.S. 974 (1966); *Goss* vs. *Illinois*, 312 F.2d 257, 259 (7 Cir. 1953); *H. J. Heinz Co.* vs. *Owens*, 189 F.2d 505, 508 (9 Cir. 1951), *cert. denied*, 342 U.S. 905 (1952); *Brooks* vs. *Briley*, *supra*, 274 F. Supp. at 553.

If special circumstances as found in *Dombrowski* vs. *Pfister*, 380 U.S. 479 (1965), again essentially an abstention situation, warrant exception even after the commencement of the state proceedings, there is nothing in the instant case to give rise to its application. We do not have here any allegations of bad faith application of statutes resulting in a "chilling effect" on first amendment exercise, *Dombrowski* vs. *Pfister*, *supra*, 380 U.S. at 487. See *Samuels* vs. *Mackell*, *supra*, 39 L.W. at 4211 (opinion of Brennan, J.). *Zwickler* vs. *Koota*, 389 U.S. 241 (1967), is not to the contrary; *Zwickler* again was an abstention situation so that the question of Section 2283 as a bar in the face of a pending proceeding was not reached; further, what *Zwickler* teaches is that in an abstention situation, even though an injunction may be inappropriate, there is nonetheless the duty to consider the application of a declaratory judgment, *Zwickler* vs. *Koota*, *supra*, 389 U.S. at 254.

The question of the requested declaratory judgment is also bound up with the question of a class action, for the appellant Dorothy Lynch seeks relief as a member of a class, and she seeks it primarily against deputy sheriff Friedler as representative of a defendant class. The court below concluded that

no class as claimed by the appellants could be defined as a practical matter (A. 25) and did not reach the question of Friedler's class, although neither consideration was necessary for its alternative conclusions. The question of the adequacy of the class determination is not presented directly in this appeal, which is appropriate in view of the jurisdictional limitation of 28 U.S.C. § 1253. Nonetheless, it is worth observing the difficulties imposed by the appellants' assertion.

The appellant Dorothy Lynch seeks to represent those persons who constitute a class "encompassing those residents of the state of Connecticut who have been and will be in the future, subjected to and or threatened with pre-judgment . . . garnishment as authorized by § 52-329 . . . of the Connecticut General Statutes." (A. 6), and further seeks to establish that the defendant Friedler represents a class consisting of "the sheriffs, deputy sheriffs, and constables in the state of Connecticut who are authorized to serve writs of attachment and garnishment", (A. 6). No class representation is ascribed to the appellees Household Finance Corporation and Goldman, or to the Credit Union.

As discussed above, the garnishment process is available at the beginning of and during virtually any civil action for damages in Connecticut, with the special exceptions noted. See pp. 25-26, *supra*. A defendant can avail himself of the process by way of a counterclaim against a plaintiff during the pendency of an action, Conn. Gen. Stat. § 52-282; and can, of course, become a garnishing plaintiff in his own right by separate action. Subject to the conditions noted, it is a process available to any party, natural or legal, who is or may be asserting a claim for money damages against any other party, whether by original action or counterclaim. Thus, any person,

natural or legal, who asserts or against whom such a claim is asserted is a candidate for the class described by the appellants.

No unifying characteristic or common thread of interest of the class exists. It is not limited to or identified by to such customary conditions as membership in an organization, *Louisiana ex rel Gremillion* vs. *N.A.A.C.P.*, 366 U.S. 293 (1961), occupation, *Smith* vs. *Board of Ed.*, 365 F.2d 770 (8 Cir. 1966); or race, *Norwalk CORE* vs. *Norwalk Board of Ed.*, 298 F. Supp. 203 (D. Conn. 1968). The alleged class certainly includes persons who have in the past, or may in the future, in their own right, make use of the very process complained of in the instant case. Clearly, as residents, the defendants Goldman, Friedler, and the Credit Union corporation would fall within the alleged class. Furthermore, it would not be possible as a practical matter to ascertain even those members of the alleged class who were, as of the commencement of this action subjected to the garnishment process in Connecticut, much less determine those persons who sometime had been or might be in the future so subjected. The real definition of this class is, quite simply, all natural and legal persons who are Connecticut residents. As such, it is a class beyond the contemplation of Rule 23, Federal Rules of Civil Procedure, a conclusion properly reached below.[12]

The other class alleged in the complaint is that theoretically represented by the appellee Friedler. This alleged class consists of all "sheriffs, deputy sheriffs and constables in the State of Connecticut" (A. 6). Much of the foregoing concerning

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[12] Consider, for instance, the notice requirement, *Eisen* vs. *Carlisle & Jacquelin*, 391 F.2d 555, 564 (2 Cir. 1968).

the appellants' own class applies equally to Friedler's class, but two additional points should be made.

First of all, it appears that in alleging the existence of this class, the appellants are attempting to cast their net far enough to catch all of the ministeral officers who could effect service of garnishment, thus precluding the utilization of these processes by any litigant in Connecticut. Some fish, however, have escaped, for Conn. Gen. Stat. § 52-50 permits service of such process to be made by, in addition to those persons cited, any "other proper officer" and by "some indifferent person". These are large fish indeed, for it is unnecessary even for an indifferent person to be a resident of the State of Connecticut. By very definition, this group is at the same time without bounds and would be unaffected by the equitable relief sought.

Secondly, and more importantly, the class allegedly represented by Friedler is not the appropriate target. Friedler himself is only a deputy sheriff, and does not fill all of the offices named in Conn. Gen. Stat. §52-50. But more importantly, servers of process have no stake in the enterprise; they are not adversaries, but merely agents for litigants seeking to use the process in question. It is inappropriate to look to this class as representing the interests opposed to the appellant. Neither appellees Goldman nor Household Finance Corporation were designated as representatives of classes. Attorney Goldman is essentially in the same agency context as deputy sheriff Friedler, and the party with the genuine adversary interest in this particular case — but no adverse interest with respect to any other member of the alleged class — is Household Finance Corporation. It, in turn, is a member of undefinable group consisting of every potential plaintiff (or defendant) — whether resident or non-resident — in the Connecticut courts, a

"class" which, at least as to its resident members, is co-extensive and identical to the appellants' alleged class.

Much of the difficulty with the alleged classes bears on the request for future injunctive relief. Passing over the absence of any kind of "case or controversy" within which properly to assess the claim, *Younger* vs. *Harris, supra*, 39 L.W. at 4204, and the complete absence of a showing of anticipated irreparable injury such as would justify such equitable relief, *Boyle* vs. *Landry*, 39 L.W. 4207, 4208 (1971), there are simply no parties before the court in any kind of genuine representative capacity who can effectively be made subject to the court's future jurisdiction.

C. Appellants' Remedies Are Adequate Under State Law.

Appellants contend that the dismissal below deprives them of any forum within which to adjudicate federal Constitutional rights. Put another way, they argue that the efficacy of Section 2283 is grounded on the assumption of the adequacy of remedies under state law; since these remedies are not in fact adequate in Connecticut, say appellants, the assumption fails, and Section 2283 should, therefore, not apply. Presumably there would be two bases for the assertion: either the State of Connecticut has maliciously refused to accord the appellants access to its legal process, the kind of harrassing action that gave rise to many of the civil rights acts in the first place, *Monroe* vs. *Pape*, 365 U.S. 167, 180 (1961); or there simply is no procedural device by which they could initiate the claims in the Connecticut courts and proceed, if necessary, to this Court. See *Sniadach* vs. *Family Finance Corp., supra*; *Atlantic*

Coast Line R. Co. vs. *Engineers, supra,* 398 U.S. at 287. No claim is made in the former instance, and it remains to examine Connecticut procedure for the availability of the remedies sought by the appellants.

What appellants have done is to obscure a critical difference between the limited authority of state courts in Connecticut to review specific garnishments on their merits and the undoubted authority of those same state courts to vindicate rights secured by the federal Constitution. Even though the state courts may have no power to release good faith garnishments except to the extent that they are excessive, *Clime* vs. *Gregor,* 145 Conn. 74, 76-77, 138 A.2d 794, 795 (1958), they certainly have the power and the responsibility to adjudicate constitutional objections to any state statutory procedure, see, e.g., *State* vs. *Licari,* 153 Conn. 127, 214 A.2d 900 (1965).

Connecticut's statutory procedure provides a variety of means by which appellants could raise in state court proceedings their constitutional objections to the garnishment process. For example, Mrs. Lynch has available to her in the Circuit Court — where appellee Household Finance Corporation's action against her is now pending — essentially the same injunctive remedies she sought in the instant action, Conn. Gen. Stats. §§ 52-2a, 52-471; and she could seek such remedies by way of counterclaim, Conn. Gen. Stat. § 52-96. Alternatively, she could raise her constitutional objections by proceeding under the specific Connecticut statutes permitting her to seek verification of the need for attachment, Conn. Gen. Stat. § 52-301; to obtain the discharge of an excessive attachment, Conn. Gen. Stat. § 52-302; or to substitute a bond, Conn. Gen. Stat. § 52-304. Finally, Section 52-29 of the general statutes would permit her to commence an action for a declaratory

judgment concerning the disputed garnishment in either the Court of Common Pleas or the Superior Court, or, alternatively, begin with a request for a declaratory judgment in a counterclaim in the pending Sixth Circuit Court action, Conn. Practice Book, § 310(e), and then move to transfer the action to a court of appropriate jurisdiction for determination of the issues, Conn. Gen. Stats. §§ 52-32, 52-33.

It is important to observe that the constitutionality of the garnishment process is not a closed issue in Connecticut. The constitutional claims raised by the appellants have never been presented to the Connecticut Supreme Court, as they have to this Court, *McKay* vs. *McInnes, supra.* They have been considered directly only in one lower court case, *Michael's Jewelers* vs. *Handy*, 6 Conn. Cir. 103, 266 A.2d 904 (1969), a decision of the Appellate Division of the Connecticut Circuit Court arising from the same Sixth Circuit Court in which the basic action is now pending. The court there, relying upon prior decisions of this Court in *McKay* vs. *McInnes, supra, Ownby* vs. *Morgan, supra,* and *Coffin Bros. & Co.* vs. *Bennett, supra,* upheld the constitutionality of the process in the face of claims identical to those presented here. This decision was apparently not appealed further. Thus, not only is there ample means of presenting the claims desired, but the question has never been passed on by the highest court in Connecticut, *Harrison* vs. *N.A.A.C.P., supra,* 360 U.S. at 1159, and a clear path is indicated for the appellants by Section 2283, *Atlantic Coast Line R. Co.* vs. *Engineers, supra,* 398 U.S. at 287.

Finally, appellants' repeated invocation of the *Sniadach* decision is singularly inappropriate. For one thing, the Connecticut statute specifically prohibits garnishment of the special kind of property involved in the *Sniadach* case, Conn. Gen.

Stat. § 52-361. For another, *Sniadach* was itself a state court case, appealed to this Court from the Wisconsin Supreme Court. See *Family Finance Corp* vs. *Sniadach*, 37 Wis.2d 163, 154 N.W.2d 259 (1967). It ill behooves appellants to rely on a state court decision to argue that the state courts of Connecticut provide no available forum.

D. Section 1983 Is Not An Exception To Section 2283.

It remains to consider whether a suit in equity under 42 U.S.C. § 1983, the statute creating the cause of action for which 28 U.S.C. § 1343 (3) is the jurisdictional implementation, is an action "expressly authorized by Act of Congress" and thus excepted from the operation of Section 2283.[13] This Court has noted but declined to reach this question on prior occasions, e.g., *Dombrowski* vs. *Pfister, supra*, 380 U.S. at p. 485 n. 2; *Cameron* vs. *Johnson*, 390 U.S. 611, 614 n. 3 (1968).

Section 2283 has undergone only two significant changes in its long history. As originally enacted, it contained no exception to its broad prohibition, Act of March 2, 1793, ch. 22, § 5, 1 Stat. 335. In 1875, an amendment providing for

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[13] In addition to the "expressly authorized" exception, Section 2283 contains two others: the first, permitting intervention "in aid of its jurisdiction," pertains to the protection of a federal court's previously acquired jurisdiction, as where it was the first of two competing courts to assert jurisdiction over a contested res, *Mandeville* vs. *Canterbury*, 318 U.S. 47, 48-49 (1943). The other exception permits intervention to "protect or effectuate its judgments." Neither is applicable here.

an express exception to permit a bankruptcy court to stay conflicting state proceedings was added, Rev. Stat. § 720 (1875)and in this form, the statute appears as § 265 of Judicial Code of 1911, Act of March 3, 1911, ch. 231, § 265, 36 Stat. 1162. Subsequently, Section 265 underwent revision in the 1948 code and emerged in its present form as 28 U.S.C. § 2283; in this revision in 1948, the specific bankruptcy exception was dropped and the three specific exceptions noted above first appear.[14]

The history of the statute is discussed at length in *Toucey* vs. *New York Life Insurance Co.*, 314 U.S. 118 (1941). *Toucey* is generally thought of as limiting the development of further non-statutory exceptions to (then) Section 265, while the 1948 revision resulting in Section 2283 is suggested by the Advisor to restore the law as it was before *Toucey*. *Boyle* vs. *Landry, supra*, 39 L. W. at 4210 n. 3 (Douglas, J., dissenting). The authorities appear in agreement that the 1948 revision was not intended to make any significant changes in the statute, nor to repeal any of the pre-*Toucey* exceptions to its predecessor, Section 265. See *Amalgamated Clothing Workers of America* vs. *Richman Bros.*, 348 U.S. 511, 523 (1955) (Warren C. J., Dissenting); Note, 50 Va. L. Rev. 1404, 1406 (1964); Note, 74 Harv. L. Rev. 726, 733, 737 (1961). It is instructive to test this premise and to gauge the reach of the "expressly authorized" exception of the present Section 2283, examining how the earlier statutory exceptions became incorporated in the 1948 revision. *Toucey* takes us a long way on this journey and notes, in 1941, the existence of only five

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[14] See note 13 *supra*.

statutory exceptions to Section 2283:

1. *Bankruptcy Proceedings*: This exception was specifically incorporated in Section 265 of the 1911 Code at the time of the *Toucey* decision. It is not clear why it needed to be. The Bankruptcy Act of 1867, ch. 176, § 21, 14 Stat. 526 expressly provided that a federal court in bankruptcy had the power to stay other actions against the bankrupt, as it does in its present form, 11 U.S.C. § 29. This alone would seem to have been a clear enough indication that the Bankruptcy Act was in fact an express exception; nonetheless, Congress felt obliged in 1875 to remove any doubt by incorporating a specific exception to the anti-injunction statute by allowing, in the face of pending state proceedings, an injunction "authorized by any law relating to bankruptcy," Rev. Stat. § 720 (1875). The year 1875 is not without significance: the predecessors of Sections 1983 and 1343 (3) in Section 1 of the Civil Rights Act of April 20, 1871, ch. 22, 17 Stat. 13, had been in effect for four years; if the specific direction of the Bankruptcy Act nonetheless required express inclusion in the anti-injunction statute, how much more so would the then version of Section 1983 which, as now, contained no such reference to the question of a pending state proceeding nor any authorization permitting a stay or other interference. That civil rights legislation was in the wind in 1875 is evidenced by the passage of the Civil Rights Act of that year, Act of March 1, 1875, 18 Stat. 335, subsequently overturned in *Civil Rights Cases*, 109 U.S. 3 (1883). In the 1948 revision of the anti-injunction statute, the specific reference to the Bankruptcy Act was removed, and the Revisor's note, H. R. Rep. No. 308, 80th Cong. 1st Sess. A 181 (1947), suggests that it was intended to be included in the "expressly authorized" exception. See

Note, *supra*, 74 Harv. L. Rev. at 739. In view of the express cognizance taken by the Bankruptcy Act of a situation involving a related and pending state proceeding, and in view of the express authorization in that Act to intervene in such proceedings — two characteristics not at all applicable to Section 1983 — this suggestion is perfectly justified, and the Bankruptcy Act exception can be clearly recognized today as one "expressly authorized."

2. *Removal Actions*: The removal statutes originally contained a direction that state proceedings, once the cause had been removed to the federal court, should "proceed no further". Act of September 24, 1789, ch. 20, § 12, 1 Stat. 79. It was not felt necessary to incorporate this section in 1875 as in the case of the Bankruptcy Act; the same year this Court had deemed it an implied exception to the anti-injunction statute as one necessary to sustain and protect federal jurisdiction, *French* vs. *Hay*, 89 U.S. (22 Wall) 250 (1875), where it would seem to fall in the light of the 1948 revision.

3. *Shipowner's Liability:* The Act of March 3, 1851, ch. 43, § 4, 9 Stat. 635,[15] provided that, after a shipowner transferred his interest in a vessel to a trustee for the benefit of his creditors, "all claims and proceedings against the owner or owners shall cease." *Toucey* deemed this, similar in its phraseology to the original removal statute, as another "implied exception," as it had been viewed in *Providence and New York Steamship Co.* vs. *Hill Mfg. Co.*, 109 U.S. 578 (1883). This again would fit clearly within the "aid of jurisdiction" exception of § 2283 today.

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[15] Presently, 46 U.S.C. § 185.

4. *Interpleader*: This 1926 statute, ch. 273, § 2, 44 Stat. 416,[16] contained, at the time of *Toucey*, an express statement with regard to the power "notwithstanding any provision of the judicial code to the contrary" to enjoin the institution or prosecution of "any suit or proceeding in any state court." This is as clear an example of an express exception as can be found.

5. *Farm-Mortgage Act of 1933*: At the time of the *Toucey* decision, the Frazier-Lempke Farm-Mortgage Act of 1933, 47 Stat. 1473,[17] did not include an express authorization for an injunctive remedy against state proceedings but was phrased in similar fashion to the early removal statutes and the Shipowner's Act of 1851. It provided that proceedings "shall not be instituted, or if instituted . . . shall not be maintained in any court" once the federal jurisdiction described in the Act was asserted. However, the statute was amended in 1935 to provide that the federal court may "stay all judicial or official proceedings in any court," Act of August 28, 1935, § 2, 49 Stat. 944, so that in the light of the 1948 revision of Section 2283, it is readily seen as an "expressly authorized" exception.

There are other non-statutory situations discussed in *Toucey*: the "res" question which is clearly subsumed in Section 2283 as an "aid of jurisdiction" exception; the enjoining of fraudulent state judgments, cases found in *Toucey* to rest on a "doubtful" foundation, 314 U.S. at 136, which are not so much exceptions as questions of applicability in the light

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[16] Presently, 28 U.S.C. § 2361.

[17] Presently, 11 U.S.C. § 203(s) (2).

of the qualification of § 2283 with respect to "proceedings" pending in a state court, see *Ex Parte Young*, 209 U.S. 123 (1908); and the so-called "relitigation" cases, the substance of *Toucey* itself, which, again, that decision declines to recognize as being "ill-considered," *Toucey, supra*, 314 U.S. at 139.[18] To the extent that this class of cases is identified today, it would seem that they would be measured under Section 2283 by either the "aid of jurisdiction" or the "effectuation of judgment" exceptions. There was an additional exception apparently emerging to some extent before the *Toucey* decision which is not discussed directly in that case. This appears in *United States* vs. *Inaba*, 291 Fed. 416 (E.D. Wash. 1923), which does not fit easily into the Section 2283 exceptions and can be explained only in terms of the paramount interest of the United States in seeking an injunction in a federal court against a state proceeding to which it is not a party and in which an irreparable injury to a national interest is threatened. See *Leiter Minerals, Inc.* vs. *United States*, 352 U.S. 220 (1957).

Between the date of *Toucey*, 1941, and the revision seven years later, this Court in 1944 added one more implied ex-

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[18] One additional statutory exception in the Habeas Corpus Act is referred to in *Toucey* in a footnote, but not discussed at length, perhaps because the "exhaustion of state remedies" requirement of the statute was thought to preclude in most instances intervention in a pending proceeding. Nonetheless, the language of the statute, today 28 U.S.C. § 2251, would appear to qualify as an express exception. *See Toucey* vs. *New York Life Insurance Co., supra*, 314 U.S. at 132 n. 4.

ception to the list, dealing with emergency price controls, Act of January 30, 1942, ch. 26, 56 Stat. 23. *Bowles* vs. *Willingham*, 321 U.S. 503, 510 (1944). This exception is generally deemed to fall within the "aid of jurisdiction" class of Section 2283, although the jurisdiction here was that of a federal administrator. See Note, *supra*, 74 Harv. L. Rev. at 735.[19]

It is thus impossible from the history of Section 2283 to find any intention to embrace Section 1983 within its "expressly authorized" exception. The precise opposite is true. Congress did not see fit to address the question in 1875, as it did in the case of the bankruptcy exception, notwithstanding the forceful language of the Bankruptcy Act. Nor was any attempt made to address the language of Section 1983 in the manner accomplished in the case of the Interpleader Act in 1926 or the amendment to the Frazier-Lempke Act in 1935. Section 1983 is not mentioned at all in *Toucey*, and this omission, in the light of the scholarship of that opinion, is decisive. Certainly no decision of this Court after *Toucey* (1941) argues against this premise; indeed, the opposite is true, since in adding one more "implied" exception, *Bowles* vs. *Willingham*, *supra*, this Court readily accepted *Toucey* as the starting point of the catalogue of Section 2283 exceptions. The recognized exceptions existing before 1948 are all readily

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[19] It has been suggested that a more proper view would be to assess this exception, dealing with wartime emergency powers of a federal administrator, through the eyes of *Leiter Minerals, Inc.* vs. *United States*, *supra*. See *Baines* vs. *City of Danville*, 337 F.2d 579, 589 (4 Cir. 1964), *cert. denied*, 381 U.S. 939 (1965).

accounted for in the 1948 language of Section 2283 and there is simply no room for Section 1983.

Although there is authority to the contrary,[20] the majority of lower court decisions since 1948 have come to the same conclusion. *Brooks* vs. *Briley, supra,* 274 F. Supp. at 553. See, e.g., *Stevens* vs. *Frick* 372 F.2d 378, 381-82 (2 Cir. 1967), *cert. denied,* 387 U.S. 920; *Baines* vs. *City of Danville, supra,* 337 F.2d at 590-91; *Moss* vs. *Jones,* 288 F.2d 342, 344 (6 Cir. 1961), *cert denied,* 368 U.S. 868; *Smith* vs. *Village of Lansing,* 241 F.2d 856, 859 (7 Cir. 1957). This Court, as noted above, has recognized the question, but has preferred to act on other grounds. However, in such cases as *Younger* vs. *Harris, supra,* and *Atlantic Coast Line R. Co.* vs. *Engineers, supra,* where the question of a pending state proceeding was before it, the Court has couched its abstention action in the same purposeful terms that it has used consistently in its interpretation and explanation of Section 2283. The same is true of like cases which stopped short of an actual state proceeding, *Harrison* vs. *N.A.A.C.P., supra, Douglas* vs. *City of Jeanette,* 319 U.S. 157 (1943), *Samuels* vs. *Mackell, supra,* where again, the decision to refrain from effective intervention was on the basis of a judicial policy identical to the legislative purpose

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[20] See *Cooper* vs. *Hutchinson,* 184 F.2d 119, 124 (3 Cir. 1950); *Machesky* vs. *Bizzell,* 414 F.2d 283, 286-91 (5 Cir. 1969). It is also necessary to observe that there was a conflict of authority before 1948: Compare *Aultman & Taylor Co.* vs. *Brufield,* 102 Fed. 7 (C.C.N.D. Ohio 1900), *appeal dismissed,* 46 L. Ed. 1265, 22 S. Ct. 938 (1902), and *Tuchman* vs. *Welch,* 42 Fed. 548 (D. Kan. 1890).

of Section 2283. If, therefore, a judicial policy expressive of the Congressional purpose in Section 2283 is sufficient to require federal forebearance, it would seem that the Congressional mandate of Section 2283, in those limited situations where a state proceeding is pending and the statute directly applicable, ought to be of equal force even in the absence of such a policy. From another direction, it is equally clear that Section 1983 has not been seen as a springboard to hurdle the fact or the policy expressed in Section 2283;[21] thus, if ordinarily the judicial policy statement of the purposes of Section 2283 is of sufficient importance to preclude intervention through Section 1983, the Congressional mandate of the statute itself ought to be equally so in cases involving pending proceedings without reaching the question of judicial policy. See *Stefanelli* vs. *Minard*, 342 U.S. 117, 121 (1951); *Collins* vs. *Hardyman*, 341 U.S. 651, 657-58 (1951).

Section 1983 creates, generally, a cause of action and Section 1343(3) confers original — *but not exclusive* — jurisdiction in the district courts to hear this cause. Both statutes contemplate that the cause of action may involve the constitutionality of a state statute, and in this event where equitable

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[21] Except to the extent of the limited *Dombrowski* situation, where special circumstances so justified. But even here, the supervening interest of Section 1983, incorporating, as it did, first amendment considerations, was deemed sufficient to override only a judicial policy, and the question of whether it would have been sufficient to prevail against Section 2283 was carefully laid to one side. *Dombrowski* can be distinguished from a direct Section 2283 situation, on the basis of there being no state "proceeding." *Dombrowski* vs. *Pfister*, *supra*, 380 U.S. at 485 n. 2.

relief is sought, the three-judge court requirement of 28 U.S.C. §§ 2281 and 2284 indicates Congressional concern for the sensitivity of that confrontation when in a federal court. However, there is nothing in Section 1983 or Section 1343(3) which suggests that pending state proceedings should stop or cease during the pendency of the claim, and certainly no suggestion that they should be stayed. Section 2283 required an express statutory authorization for authorizing such extraordinary interference, and none can be found.

The court in *Amalgamated Clothing Workers of America* vs. *Richman Bros., supra,* 348 U.S. at 516, began to clarify this requirement by indicating that no specific reference to Section 2283 need be required in such an express authorization. This is a sensible conclusion, for the authorization, for instance, in the present Farm-Mortgage Act, 11 U.S.C. § 203(s)(2), although including no specific reference to Section 2283, is about as clear as possible with such language as " . . . stay all judicial and official proceedings in any court". Even if literal reference to Section 2283 is not a requirement, however, what must certainly be present to qualify as an "expressly authorized" exception is some statement that shows that Congress clearly took cognizance of the situation to which Section 2283 is addressed, that is, some statement of "legislative concern about procedural relations between the judicial systems", Note, 78 Harv. L. Rev. 994, 1051 (1965), and notwithstanding recognition of the problem, authorized measures to be taken which it had otherwise forbidden. That is true of those other express exceptions discussed above and would seem to be the least that is required in view of the long standing policy of Section 2283. That statute, after all, is a "clear-cut prohibition, qualified only by specifi-

cally defined exceptions", *Amalgamated Clothing Workers of America* vs. *Richman Bros., supra,* 348 U.S. at 516. It is therefore reasonable to require the same degree of clarity for the exception as for the prohibition, as, in fact, has been the practice of the Congress. This is perfectly consistent with the Court's application of its own policy of abstention in such matters where ". . . any doubt as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed . . ." *Atlantic Coast Line R. Co.* vs. *Engineers, supra,* 398 U.S. at 296, 297.

This view does no violence to Section 1983 or Section 1343(3). A grant of general equity jurisdiction — again not exclusive in the federal courts — is not at all inconsistent with a statutory limitation upon its exercise, *Moss* vs. *Jones, supra,* 288 F.2d at 344. Section 2283, expressing a basic federal concern for intervention in the conduct of state proceedings thus would operate only as a minor restriction in the scope of a Section 1983 cause of action, a restriction itself consistent with the fact that Section 1343(3) left concurrent jurisdiction of the cause of action in the state courts. *Baines* vs. *City of Danville, supra,* 337 F.2d at 589. The converse is quite different. If Section 1983 were construed as an express exception to Section 2283, it would constitute a revolutionary alteration of state-federal relations,[22] one which finds no basis in the language of Sections 1983 or 1343(3), which flies in the face of prior Congressional requirements for such exceptions, and which ignores the undoubted competency and jurisdiction of

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[22] This revolutionary change would be most acute in criminal matters. *Younger* vs. *Harris, supra.* See Note, *supra,* 74 Harv. L. Rev. at 739.

state courts to address the cause of action in question. Congress never intended Section 1983 to create an express exception to Section 2283, and this Court should not do so now. *Atlantic Coast Line R. Co.* vs. *Engineers, supra; Amalgamated Clothing Workers of America* vs. *Richman Bros., supra; Toucey* vs. *New York Life Insurance Co., supra;* Note, *supra,* 50 Va. L. Rev. 1404 (1964); Note, *supra,* 78 Harv. L. Rev. at 1051; Note, *supra,* 74 Harv. L. Rev. at 738.

CONCLUSION

For the reasons given, the Court should dismiss the appeal for want of jurisdiction under 28 U.S.C. § 1253, or, in the alternative, affirm the decision of the court below.

Respectfully submitted,

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